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IN THE

Supreme Court of the United States

NOVEMBER TERM, 1963

No. 562

MILTON E. SPATT,

Appellant,

—against—

THE CITY OF NEW YORK, LAWRENCE E. GEROSA, as Comptroller of the City of New York, HILDA G. SCHWARTZ, as Treasurer of the City of New York and WILLIAM LEFKOWITZ, as Warrant Agent of the City of New York,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OPPOSING MOTION TO DISMISS APPEAL

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PRELIMINARY STATEMENT

The appellant herein appeals from a judgment of the Supreme Court of the State of New York entered May 22, 1963, pursuant to the remittur of the Court of Appeals of the State of New York, dated May 2, 1963.

The Court of Appeals affirmed the decision of the Appellate Division of the Supreme Court, Second Judicial De-

partment. The Appellate Division had previously reversed the order and judgment of the Supreme Court of the State of New York, County of Kings.

The decisions are correctly cited in appellant's Jurisdictional Statement and set forth in full in the appendix thereto (pp. A-1 to A-8).

STATEMENT OF THE CASE

Appellant in this action, seeks a judgment declaring the compensating use tax to be unconstitutional. It is appellant's contention that the tax as applied herein, is violative of the Equal Protection clause and Due Process clause of the 14th Amendment to the Constitution of the United States.

The appellant, a resident of the City of New York, purchased a Lincoln automobile in the City of Long Beach, State of New York, for the sum of $8,250.00, and brought the automobile back to New York City to be used there. In making the purchase, appellant traded in his used car and received a credit of $4,900.00 against the purchase price. He paid the balance, $3,350.00 in cash.

Appellant paid a compensating use tax of $100.50, based upon the cash paid on the purchase of the automobile.

The City of New York, through its Comptroller and Treasurer, assessed appellant the additional sum of $197.81. This latter sum was based upon the difference between what appellant paid and the tax computed on the entire purchase price, together with penalties.

It is admitted that if the sale were made within the City of New York, or involved an interstate transaction, there would be no additional tax due to the City.

In all the Courts below, contrary to its present position, respondent argued that the compensating use tax applied

to all purchases of residents of the City of New York made anywhere outside the City of New York. Indeed, the plain meaning of the statute, Title M, Article 2 of Chapter 41 of the Administrative Code of the City of New York, and Article 42 of the Comptroller's Regulations (Appellant's Jurisdictional Statement, pp. A-8, A-10), the compensating use tax applies to all purchases made by New York City residents outside of the city, including interstate purchases.

After the decision of the Court of Appeals of the State of New York, rejecting appellant's contention herein, the Supreme Court of the United States handed down its landmark decision in the case of *Haliburton Oil Well Cementing Co.* v. *Reily*, 373 U. S. 64 (1963).

In that case, it was held to be an unconstitutional burden on interstate commerce to impose a greater use tax on an article, than the taxing authority imposed on the same article by virtue of the sales tax. Recognizing the full impact of the *Haliburton* case, the appellee now frankly admits that this tax can now no longer be applied to an interstate transaction (Appellee's motion to dismiss, p. 5).

Yet, the appellees still maintain that they can impose this admittedly discriminatory tax upon the appellant solely because it is an intrastate transaction. Such rationale is indeed staggering.

POINT I

THE DISCRIMINATORY TAX WHICH IMPOSED A HIGHER TAX ON APPELLANT, A NEW YORK CITY RESIDENT, WHO MADE AN INTRASTATE PURCHASE OUTSIDE NEW YORK CITY, THAN ON A RESIDENT WHO MAKES AN IDENTICAL INTERSTATE PURCHASE OR CITY WIDE PURCHASE, IS VIOLATIVE OF THE EQUAL PROTECTION CLAUSE OF THE 14th AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

This is essentially a question of classification. If the classification of the tax statute is not based upon substantive difference, the tax must fail. As was said in *Quaker City Cab Co.* v. *Pennsylvania*, 277 U. S. 389 (1927), a tax is unconstitutional which—

> " * * * fails to meet the requirements that a classification to be consistent with the Equal Protection clause must be based on a *real and substantive difference having reasonable relation to the subject of the legislation.*"
>
> *Louis K. Liggett & Co.* v. *Lee*, 288 U. S. 517 (1932).

As justification for the tax, the City puts forward the following grounds:

1. Greater expense and trouble of collection of the use tax because local vendors filed quarterly returns and out of city vendors are not so required.

2. To equalize or adjust the tax burden because when a sale is made in New York City, the traded in car will also be sold within the City resulting in a sales tax on the second purchase.

3. To encourage local business which are benefited by the admitted discriminatory tax.

These bases are not "real and substantive", as required by *Quaker City, supra.* In fact, they are not even factually correct. This is especially so when it is conceded that interstate transactions are not burdened by this discriminatory tax. Certainly there is no greater expense in enforcing the collection of a tax of a California purchase than in a purchase made in the City of Long Beach, New York, just a few miles of the City of New York.

The second explanation is equally fallacious. There is a greater likelihood, not less, that there will be a second sale to a New York City resident when the car is traded in within a few miles of New York City, as in this case, than when the car is traded in in a completely foreign state, perhaps thousands of miles away.

Lastly, it does not even encourage sales within New York City, because the sales made in interstate commerce are also, admittedly, not taxed as provided in the compensating use tax. Thus, even the very explanation of the appellees do not withstand scrutiny.

While the Court of Appeals in its decision allowed the foregoing as a basis for the classification, it must be remembered that it was before the decision of this Court in *Haliburton,* and at a time when the appellees were still contending that this discriminatory use tax was valid as to interstate transactions.

It is inconceivable that the Court of Appeals would maintain that the extra cost of enforcement and likelihood of resale within the City of New York, were a legal basis for the classification if appellees had then conceded that the compensating use tax was not applicable to the interstate transaction. Such a result would be beyond all reason.

The appellees in support of a decision below, say that there is no need to show higher cost of enforcement. Assuming, arguendo, that such is so, there must still be some correlation between the increased tax and the cost of en-

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forcement. In the taxing statute under consideration herein, the increase is based solely upon the value of the traded in article. When no article is traded in the tax is equal. The tax increases in direct proportion to the value of the traded in article.

The statute must fail because it appears on its face that there is no correlation between the cost of enforcement and the increase in the tax. *Mullaney* v. *Anderson,* 342 U. S. 415 (1952).

It is not appellant's contention that every discriminatory burden on interstate commerce is automatically a violation of the Equal Protection clause. If that were so, there would be no further need for the Interstate Commerce clause. However, it is appellant's contention that *Gregg Dyeing Co.* v. *Query,* 286 U. S. 472 (1932), stands for the proposition that a *tax* which is discriminatory under the Interstate Commerce clause is also a violation under the Equal Protection clause. Under circumstances of classification such as these, it logically follows that when a large segment of a classification is eliminated as here because of a violation of the Interstate Commerce clause, the remainder of the clause would have no "real and substantive" basis. There can be no justifiable bases to formulate a clause comprised solely of persons engaged in intrastate commerce, where the same conditions exist on interstate commerce.

In the instant case, the taxing authority goes even further and discriminates against only a certain part of the intrastate purchase without any rational bases for the classification.

In considering the validity of this tax, it must be remembered that the sole purpose thereof is to complement the sales tax. This was admitted by the appellees (Appellees' motion to dismiss, p. 6).

CONCLUSION

THERE IS A SUBSTANTIAL FEDERAL QUESTION PRESENTED BY THIS APPEAL TO WHICH THE COURT SHOULD GIVE PLENARY CONSIDERATION.

Respectfully submitted,

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Attorney for Appellant.